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### Cover Page Footnote

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## PANEL II: INFORMATION REGULATION AND THE FREEDOM OF EXPRESSION

### SOME REALISM ABOUT THE FREE-SPEECH CRITIQUE OF COPYRIGHT

*David McGowan\**

#### INTRODUCTION

Here are two examples of how copyright might, or might not, help authors try to influence the way people see creative works:

#### *The Ear-Slicing Song*

In 1973, a short-lived band named Stealers Wheel recorded a bouncy little pop tune called *Stuck in the Middle with You*.<sup>1</sup> In 1992, Quentin Tarantino used the song as background music for a scene in his film, *Reservoir Dogs*.<sup>2</sup> In that scene, a thug tortures a kidnapped police officer by beating his face bloody, slicing off his ear with a straight razor, and dousing him with gas in preparation for setting him on fire, dancing to the tune all the while. Before lighting the officer on fire, the thug is shot by an undercover cop, who has been observing these events.

The scene is highly sadistic. Its incongruity with the music is brilliant and memorable filmmaking. If you have seen the movie, it is very hard to hear the song without thinking of the scene. Gerry Rafferty cowrote the song with his partner Joe Eagan. He does not like violent movies. Tarantino's people sent him a script for the movie, but Rafferty gets so many requests to use his music that he did not pay much attention to the scene. He and Eagan just said, in effect, "Sure, why not," and gave their permission.<sup>3</sup> If Rafferty had paid attention, copyright would have given

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1. Stealers Wheel, *Stuck in the Middle with You*, on Stealers Wheel (Leiber & Stoller 1973).

2. *Reservoir Dogs* (Live Entertainment & Dog Eat Dog Productions Inc. 1992).

3. DVD: Tenth Anniversary Special Limited Edition of *Reservoir Dogs* (Live Entertainment & Dog Eat Dog Productions Inc. 2004) (interview with Gerry Rafferty, songwriter).

him the power to keep viewers of the movie from forever remembering his work as the ear-slicing song.

*The Anti-Bush Anthem (that Wasn't)*

In 2004, Michael Moore's movie, *Fahrenheit 9/11*,<sup>4</sup> was released. It depicts President George W. Bush and his administration as incompetent and immoral. The last scene shows President Bush struggling with the ever-insurgent English language: "There's an old saying in Tennessee," he tells reporters, and then flounders. "I know it's in Texas, probably Tennessee. That says 'Fool me once [pause], shame on . . . shame on you. [Long pause] Fool me. [Pause] You can't get fooled again.'"<sup>5</sup>

Moore wanted to end the film by fading from the President's language-wrestling and rolling the credits while playing *Won't Get Fooled Again*, a well-known song by The Who.<sup>6</sup> The song would play off of the President's words and at the same time reinforce Moore's message that viewers should not get fooled into voting for President Bush in the 2004 election. This placement of the song would invite viewers to see it as an anti-Bush anthem. Moore asked for permission to play the song at the end of the movie.<sup>7</sup>

Pete Townshend plays guitar for The Who. He wrote the song, and media reports suggest he holds the rights in the composition.<sup>8</sup> He refused Moore's request. His motives were mixed. Moore offered much less than the going rate to license the song.<sup>9</sup> Townshend saw no reason to accept such a sum. Moore's producer, Harvey Weinstein, interceded with Townshend, describing the film to him and asking for special consideration.<sup>10</sup>

That didn't help. Townshend had seen one of Moore's previous films, *Bowling for Columbine*,<sup>11</sup> which caused him to distrust Moore.<sup>12</sup> Townshend meant *Won't Get Fooled Again* to express skepticism of both politicians and revolutionaries, indeed of democracy itself, in which the people always seem to elect politicians they find wanting.<sup>13</sup> The song is

4. *Fahrenheit 9/11* (Miramax Films, Dog Eat Dog Films & Fellowship Adventure Group 2004).

5. *Michael Moore Is a Bully, Says Who Guitarist*, Guardian Online, July 14, 2004, <http://film.guardian.co.uk/news/story/0,12589,1261143,00.html> [hereinafter *Michael Moore Is a Bully*].

6. The Who, *Won't Get Fooled Again*, on *Who's Next* (MCA Records 1971).

7. *Michael Moore Is a Bully*, *supra* note 5.

8. *Id.* The implication of asking for Townshend's permission is that he holds the rights in the composition. His permission would otherwise be unnecessary.

9. *An Image Inconsistent with His Lifestyle*, Canberra Times, July 17, 2004, at B09.

10. *Id.*

11. *Bowling for Columbine* (Dog Eat Dog Films 2002).

12. This view was possibly borne out by Moore's subsequent claim that Townshend denied permission because he favored the war in Iraq. See *Michael Moore Is a Bully*, *supra* note 5. Evidently if you are not with Moore, you are against him.

13. This explanation is from Townshend, in an entry on his weblog that has since been removed. See *An Image Inconsistent with His Lifestyle*, *supra* note 9.

more about Moore than for him. Moore used Neil Young's *Rockin' in the Free World* instead.<sup>14</sup>

Suppose we treat Rafferty's casual regard for his rights as representing what the world would look like if he had no power to stop Tarantino's use of his song, but we also keep in mind that he does not like violent movies.<sup>15</sup> These examples then represent two different ways the law can deal with efforts people make to influence how an audience sees a work. The law could say that works are up for grabs. Anyone could use any work to make any point, or to try to make people see the work the way they see it. Authors or their assignees would have no special claim. The law could say the opposite, too.

The probable result of the first rule is that any given work would have more meanings than if the second rule were in place, but each meaning would likely be bleazier and more diffuse than would be the case under the second rule. The probable result of the second rule is the opposite.

These examples illustrate alternative structures of management. They do not present one example of management and one example of freedom, nor do they present one example of autonomy and one example of suppression. Townshend and Tarantino both seek to influence what a work means to people who hear it. Moore and Rafferty are both affected by these efforts.

Both examples make an important point: Audiences understand works in light of a cluster of facts and circumstances we call context. Contexts change, so meanings can change. People may understand a work in different ways at different times. One way a meaning can change is for one person to take a work and place it in a new context of their own creation, trading on its meaning and thereby imbuing the work with their own perceptions. In *Reservoir Dogs*, Rafferty is the author of the ear-slicing song; in *Fahrenheit 9/11*, Townshend would be the author of the anti-Bush anthem. Whether that happens, when it happens, and how it happens depends in part on which of the two management structures the law adopts.

The changeability of meaning is fundamental to the relationship between copyright and speech. Take whatever collective description of free-speech activity you prefer: the development of common culture,<sup>16</sup> democratic civil society,<sup>17</sup> or what have you. Call it "speech." Because meanings can change, an author's contribution to speech may end when a work is published, but it does not have to. If the law gives her the power, an author

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14. Neil Young, *Rockin' in the Free World*, on Freedom (Reprise Records 1989).

15. The only difference is that, in such a world, Tarantino would not have had to pay to use it.

16. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 545-46 (2004).

17. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 285 (1996) [hereinafter Netanel, *Civil Society*]; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 16 (2001) [hereinafter Netanel, *Skein*]; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 Vand. L. Rev. 1879, 1880-81 (2000).

can keep on trying to manage the meaning of a work over time. Sometimes, as with Pete Townshend, the author will succeed.<sup>18</sup>

For this reason, when one speaker wants to use another's work, the relevant legal rules embody a choice between two speech interests. Because meanings can change, and because authors may affect that change, this choice is not a choice between an author who has had his say and one who wants to speak. It is between two people who would like to try to make people see a certain work a certain way.

So there is good news and bad news. The good news is that whichever of these rules, or any combination of them, the law adopts, a speech interest will be advanced. The bad news is that whichever rule it adopts, a speech interest will be harmed. Whether you consider it good news or bad, this fact means that no notion of speech, and no theory of the freedom of speech, provides a premise for preferring one rule over the other.<sup>19</sup>

In this Essay, I want to argue that this is bad news for what I call the free-speech critique of copyright—the scholarly call for judges to use the First Amendment to limit Congress's power over copyright, or to give a boost to defendants fighting infringement suits. I will use the premises I have just outlined to explore what I see as a contradiction in the critique.

The contradiction is between realism and formalism. Like many anti-copyright arguments these days, the free-speech critique starts out from legal realist premises. It claims there is no such thing as truly private action, nor any truly autonomous individuals. The critique diverges from the path of realism, however, for two reasons. First, free-speech theory and doctrine presume that there is such a thing as private action, and that individuals are in fact autonomous. Free-speech theory does not work without some version of these presumptions. Followed to their conclusion, the critique's premises disable the free-speech doctrines they are designed to invoke.

Second, modern free-speech doctrine is very formal. The U.S. Supreme Court's stated standards, borrowed from equal protection law, do not adequately express the values and interests its holdings advance. The doctrine is a mess, but advocates of the critique embrace it anyway. They recite the standards as if the standards mean something. They treat

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18. Authors might fail in their effort to influence the way people see a work, but so might would-be copiers such as Moore. The possibility that efforts to influence perceptions of a work might fail cuts both ways, so it cannot resolve disputes over use of a work. The law cannot guarantee outcomes on this point, it can only grant or withhold, to one class of people or another, the power to try.

19. I want to disclaim any pretension that it is in any way novel to point out that rights holders such as Townshend manage meaning in a sense relevant to free speech. I think the point is obvious. What is interesting is why it goes unremarked in the free-speech critique. A good example of the non-novelty of my thesis is Justin Hughes's "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 Tex. L. Rev. 923 (1999), which discusses the value of the continuity of a message over time, including the value of continuity to one who would transform (re-code) the message.

"intermediate scrutiny" as realists accused judges of treating "property" and "contract."

Realists complained that judges who invoked legal categories were inattentive to the real conflicts of values and interests the categories affected. Most of the problems they identified had to do with distributing gains and losses between rich and poor, powerful and weak. The problem with the free-speech critique is worse. The categories it invokes are designed for, and presume, a conflict between a speaker and the state, and between speech and some other interest. They have no way to deal with conflicts between speech interests. By relying on free-speech formalism, the critique is inattentive to a fact that makes it incoherent.

The free-speech critique wants courts to favor one type of speaker over another. It plays favorites. It therefore is at odds with any conception of free speech that prohibits judges from playing favorites among speakers, as both current doctrine and the most cogent speech theories do.

To the extent the free-speech critique admits this and makes an argument for playing favorites, the argument is unsound. It rests on taking out of context language that seems precise but is in fact ambiguous, and which could be applied equally to the Raffertys and Townshends of the world as to the Tarantinos and Moores. The argument boils down to a partial equation of free-speech theory with populism. That equation is not a sound basis for constitutional doctrine, and it reduces legal realism to a partisan tactic, which it should not be.

# I. THE REALIST BASES OF THE FREE-SPEECH CRITIQUE

Legal realism can be a controversial subject, so I want to begin by setting boundaries on my use of it here. I will not argue about what realism is<sup>20</sup> or about who was and was not in the movement.<sup>21</sup> I will assert only that it is plausible to consider the arguments I use as strands of realism. If you disagree, then just take them at face value.

I use three arguments that I will call realist. One is that laws are instruments of social policy, not ontological categories above politics and policy. That idea is not uniquely realist, but realist scholars have used it to

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20. Compare Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1930) (summarizing realist work and criticizing aspects of it), with Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1233-34 (1930) (criticizing Pound for issuing a blanket indictment of realism and saying that there is no school of realists, though there was a movement).

21. For example, Professor Jack N. Balkin includes Morris Cohen in his discussion of the relation of realist themes to free-speech arguments, though he thinks Professor Cohen might be better described as a sympathetic critic of realism. Jack N. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 379 n.13. Professor Joseph William Singer, however, refers to Cohen as a central figure in legal realist thought. Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 470 n.6 (1988).

good effect.<sup>22</sup> As policy tools, laws are supposed to achieve certain ends, and legal analysis should consist of making sure that the law is achieving the right ends as well as it can.<sup>23</sup> Other concerns are likely to be, to borrow from Felix Cohen's wonderful phrase, "transcendental nonsense."<sup>24</sup>

The second argument, advanced most recently by Professor Brian Leiter, is that realism calls for the investigation of the facts and values that constitute "situation types" to which judges respond in deciding cases.<sup>25</sup> The realist predicate for this argument is that doctrinal statements often cannot explain decisions, so additional factors must be considered.<sup>26</sup> Modern free-speech doctrine is a paradigmatic example of this problem.

The third realist argument (more of a tactic) is deconstructionist. Some scholars plausibly classed as realists claimed that there is no such thing as a "private" law, so that all laws and all actions under them can be considered state action. In a similar vein was the claim that individuals are so constrained by circumstances that they cannot control that the notion of a truly autonomous person is a fiction (and a harmful one at that).<sup>27</sup> I will take these claims in turn.

## II. DECONSTRUCTING PRIVATE ACTION

Part of realism denied any natural distinction between public and private action. Any activity involving law is affected by state action, especially the assertion of rights under such "private" laws as contract and property. Some realist thinkers considered property and contract as cessions of sovereignty by the state to individuals and firms.<sup>28</sup> A strong version of this view is that the state has presumptive power to control whatever behavior it

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22. As Underhill Moore put it, "A legal institution is human behavior" repeated often enough, and in circumstances where both participants and observers recognize it as a type of behavior. Underhill Moore, *The Rational Basis of Legal Institutions*, 23 Colum. L. Rev. 609, 609 (1923). This does not mean that laws are whatever any individual thinks they are. They may be epistemologically objective, though ontologically subjective. John R. Searle, *The Construction of Social Reality* 7-13 (1995).

23. Karl N. Llewellyn identified the asking of these questions as one of the tenets of realism. Llewellyn, *supra* note 20, at 1236; *see also* Singer, *supra* note 21, at 474.

24. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

25. Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 Ethics 278, 281 (2001).

26. *Id.* On this view, realism is a combined study of judicial psychology and the sociology and economics of fact patterns to which judges respond.

27. Some scholars, particularly those associated with the Critical Legal Studies movement, treat these as core tenets of realism. *See* Singer, *supra* note 21, at 475. Others treat them as peripheral. For example, in Professor Brian Leiter's view, Morris Cohen is out, and is instead a critic of realism. Robert Hale becomes peripheral, as does the deconstruction of the public-private distinction, and Jerome Frank's psychological interests become more representative, though his skepticism would still be peripheral. Leiter, *supra* note 25, at 280. For my purposes, it does not matter whether the elements I emphasize are the "real" realism or only the critical legal studies-filtered kind, for the modern critique of copyright seems to me influenced by both.

28. Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 11 (1927).



wants to control, and therefore can fairly be charged with acting to regulate a given situation, whether or not it decides to intervene overtly.

The deconstruction of the public-private distinction echoes through current copyright debates. Professor Lawrence Lessig tells us that “‘private public’ law is oxymoronic,” and it is no surprise to see him cite Robert Hale and Morris Cohen for this point.<sup>29</sup> Scholars unhappy with form copyright licenses call them a form of “private legislation,” a term borrowed from Friedrich Kessler’s famous assault on form agreements.<sup>30</sup>

It is of course easy to say that the idea of “private public law” is incoherent. Indeed, it is so easy that it amounts to wordplay masquerading as analysis. That some laws allow people to make choices the government will respect and enforce does not mean that those laws, or choices made under them, are equivalent to choices made by state officials. Subject to some limitations, the state will recognize your choice of a spouse. It does not follow that your marriage is no different than it would have been had a state official made the choice for you. Similarly, it is no doubt true that legal institutions such as property allow some people to accumulate riches they can use to broadcast their views more effectively than poor people, but it does not follow that this speech situation is equivalent to one in which government officials decide who gets to say what.

Realist scholars do not assert such ridiculous claims. They are best read as insisting that the real question is not whether laws are public or private in some abstract sense, but whether it would be desirable to treat an action as if it were taken by the state or by a private person. Legal catchphrases should not substitute for such analysis. It is hard to argue with that idea, even if it shows up the easy rhetoric of state action—“private legislation” and all that—as every bit as hollow as the legal categories the rhetoric is designed to displace.

#### A. State Action and the Free-Speech Critique

Deconstruction of the public-private distinction is a necessary element of the free-speech critique of copyright. The critique cannot get off the ground unless it treats as state action Congress’s grant of rights to individuals and, in at least some cases, the decision of a rights holder to bring an infringement action or in some other way assert his or her statutory rights.

The free-speech critique has two approaches to the state action question. One is by-the-numbers formalism: (1) Copyright is a law, (2) that grants rights in expression, (3) which may lead to lawsuits that require state actors (judges) to evaluate the expression of an alleged infringer, (4) with an eye

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29. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 531 & n.97 (1999).

30. For the critique, see Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239, 1274 n.158 (1995) (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943)).

to possibly enjoining distribution of that expression or fining its publisher, ergo (5) copyright is state action that regulates speech. QED.<sup>31</sup>

There is little to be said for this approach. For example, in this argument the term "expression" is ambiguous. Much copyrighted expression, such as executable computer code, is not protected speech.<sup>32</sup> Much protected speech, such as ideas,<sup>33</sup> marches, unfixed street-corner rants,<sup>34</sup> readings of poetry in the park,<sup>35</sup> and the distribution or modification of works by government officials,<sup>36</sup> is not vulnerable to infringement suits, if it is subject to copyright at all.

This approach also uses the term "evaluate" ambiguously. The classic free-speech worry is that government officials will evaluate speech to see whether it suits them, and suppress or penalize speech that does not. Judges evaluating infringement claims do not judge the merit or acceptability of speech. They compare the defendant's speech to the plaintiff's. Comparing the speech of two parties, and penalizing copying of whatever content or viewpoint, does not pose the same risks as reviewing speech to see whether it is to the government's taste. It has no ideological valence. Any argument that collapses these different types of review misses more about free speech than it reveals.

The leading proponent of this argument, Professor C. Edwin Baker, starts with the premise that all speech is presumptively protected, so that laws restricting what a person wants to say are presumptively unconstitutional. Anyone has a right to say anything, even if what they want to say is what someone else has said. According to Baker, "[s]peech freedom is an embodiment of one of the most fundamental human values, the right of an individual to make her own choices about the values she expresses."<sup>37</sup>

The premise of this argument is too broad—many, if not most, speech acts, such as contracts, bribes, threats, blackmail, price-fixing, and so on are not protected speech.<sup>38</sup> More fundamentally, this argument does not work because it ignores the speaker whose words are copied. That speaker has as much normative claim as any other. Townshend would like to "make [his] own choices about the values" his song expresses, and there is no reason his

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31. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891, 900 (2002).

32. *E.g.*, *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94 (2d Cir. 2000) (rejecting a speech claim as applied to regulation of the foreign currency trading program). For an extended discussion of this subject, see David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 Ohio St. L.J. 1515 (2003).

33. 17 U.S.C. § 102(b) (2000).

34. *Id.* § 102(a).

35. *Id.* § 110(4). One might argue that Congress could choose to extend exclusive rights to such readings, and that doing so would create free-speech problems. That is a cogent claim. My point here is only to trace the outlines of current copyright law relative to current understandings of what counts as free speech.

36. *Id.* § 105.

37. Baker, *supra* note 31, at 897.

38. See David McGowan, *Approximately Speech*, 89 Minn. L. Rev. 1416 (2005).

choice is less "fundamental," or what-have-you, than Moore's desire to make Townshend's song stand for Moore's message.<sup>39</sup> Townshend objects to Moore's message, so to let Moore copy the song is to let him make his speech choice at the expense of Townshend's.

Whatever else one might say about this dispute, it cannot be resolved on the grounds of autonomy or freedom of choice, because here the choices and interests of each party conflict. Nor, as noted at the outset, can one resolve the conflict on the ground that Moore is "speaking" and Townshend is not. What is at issue is a conflict between the coherence of a message—Townshend's anti-demagogue message—and its diversity of its possible meanings—Moore's demagogic use (as Townshend sees it) of the anti-demagogue song. Both coherence and diversity contribute to "public discourse," the "marketplace of ideas," or whatever you want to call the aggregation of individual acts of protected speech. The notion that speech is good and restraint is bad therefore provides no basis for resolving a conflict between these values.

The only way to cast Moore as speaking and Townshend as not speaking is to say that the value of speech lies in the physical act of copying a song onto a movie soundtrack or, more generally, in moving one's lips, hands, or legs in a way that people can recognize as expressive. Moore wants to run the copier for his soundtrack; Townshend wants to stop it (though he runs it himself in other contexts). But it makes no sense to say that the act of running a machine, the strictly physical side of producing expression, is what free speech is all about.<sup>40</sup> There is supposed to be something special about speech that justifies us in refusing to enforce laws that restrict it. Moore's copying is different from a mechanic's alignment tools because we recognize Moore's output, and not the mechanic's, as speech.

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39. Cf. Baker, *supra* note 31, at 897.

40. Pure autonomy arguments, which might support a view of free speech divorced from its effects, tend to fall apart on practical grounds. Autonomy means people should be able to do what they want, but when what they want to do is socially costly, even the most devoted autonomy aficionado finds ways to limit the notion of autonomy to accommodate regulation that is needed to avoid social losses. Professor Baker, for example, is inclined to allow people to copy content if they plan to give it away, but not if they plan to sell it in a market transaction. Baker, *supra* note 31, at 902. He says that "[f]reedom to act (e.g., to speak) and to alienate (e.g., to provide another with your communication) are direct aspects of personal liberty. In contrast, market transactions are exercises of power over other people." *Id.* How do we know this? We do not; it is stipulated. I think this dichotomy does not hold up in either direction. Economic liberties—including market transactions—are at least plausibly part of any notion of freedom, autonomy, or what-have-you. The division of labor, and the market transactions it implies, does not negate liberty or individual autonomy. The lesson of the twentieth century is just the opposite. And nonmarket behavior can be highly instrumental. Since Aristotle, people have studied rhetoric as a way of exercising power over others. It may be the power of reasoned argument, or it may be the power of the sophist, but lots of speech is instrumental in the sense that the speaker wants to persuade a listener to do something in the speaker's interests. And it may well be instrumental in the further sense that the speaker wants to trick the listener into doing so, or to shock and offend them. The dichotomy between instrumental expression, or assertions of power, on the one hand, and "liberty," on the other, is unsound.

The problem for Professor Baker's theory is that we recognize Townshend's output as speech, too. Townshend's outputs initially consisted of both what he put into the song and what he left out. No one would say (or if they did it would be baseless) that Moore could come into Townshend's recording studio and insist that Townshend spin the song to damn President Bush. The same principle applies to efforts to manage perceptions of a song over time. Once we recognize that meanings change with contexts, it follows that Townshend's management of his song (if the law lets him try to manage it) makes him a marginal speaker in the sense of one who manages the relation between a text (the song) and context. Management over time is not quite the same as an initial recording—once that recording is fixed and released there is at least one publicly accessible and constant version (though Townshend could record a new one)—but that does not mean that the choice to keep a text out of a context is not a choice to advance a meaning, and thus to advance free-speech values. There is no particular reason to deny that Townshend's choice not to voice Moore's message, even if that choice is implemented by not copying instead of copying, advances such values.<sup>41</sup> By-the-numbers formalism does not work.

The critique's second approach to state action argues that copyright is so tightly bound up with speech that its effects justify treating copyright itself, and suits under it, as state action. This argument is not as bad as the formal approach, but it is not very persuasive either.

Effects-based arguments have a hard time supplying a principle for determining when a law or act should be treated as state action and when it should not. All laws affect expression,<sup>42</sup> so the fact of an effect cannot itself determine which acts should be treated as public and which as private. Some effects are bigger than others, so one could try using the size of effects to decide this question. But that is harder than it sounds.

General laws, such as contract and property, have fundamental and pervasive effects on pretty much everything everyone does, including expression.<sup>43</sup> The effects may be hard to see, accustomed as we are to taking property rights for granted as part of the background against which

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41. This argument might strike many people as odd. Many will want to say that it is true that Moore could not and should not be able to interfere with the original recording of Townshend's song, but that the situation is different once Townshend releases his work. Once released, the work is part of common culture and everyone should be able to use it. That is just an assertion, however; it is the thing to be proved, not a proof.

42. Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 *Hastings L.J.* 921, 927 (1993).

43. Suppose you own the only theater in town and refuse to rent it out for a production of *Hair* because you dislike the play. Or suppose you own a Gauguin and refuse to lend it to an exhibition claiming to show how Van Gogh and Gauguin influenced each other, because you think that claim is rubbish. Each example is logically equivalent to copyright; neither would present a free-speech problem in the eyes of most courts. Multiplied across all forums for expression and all expressive objects, such effects are huge.

speech occurs, but they are there.<sup>44</sup> If the size of speech effects justifies treating the assertion of a right as state action, the free-speech critique commits judges to free-speech review of at least property in realty and chattel, and contract law.<sup>45</sup>

The free-speech critique tries to get around this problem by abandoning direct effects analysis and circling back to the structure of the laws in question and the motive of the state in enacting them. For example, Professor Neil Weinstock Netanel says that real property rights do not have to be treated as state action subject to free-speech review because those regulations are “general” and “impose only isolated and incidental burdens on speech.”<sup>46</sup>

These distinctions are weak. There is no reason to believe that a general regulation would have a smaller effect than a more particular one; law, logic, and common sense point the other way. There is no fair use defense to trespass to realty, nor any concept of merger that will erase a real property line. This claim implies that constitutionalizing fair use would have greater speech effects than a decision creating in every deed a free-speech easement in favor of the public. Not likely.<sup>47</sup> The claim that the speech effects of property rules are “isolated” is hard to comprehend; they are pervasive.

To the extent that the generality of property rules has anything to do with treating copyright as state action, the free-speech critique gets the relationship backwards. Copyright’s effects on speech are less pervasive than the effects of property rights in realty or chattel, so free-speech review of copyright would be less disruptive, and thus more palatable, than free-speech review of more general laws. That is a cogent argument, but it contradicts rather than supports the effects approach to state action.

The claim that property rules impose only “incidental” burdens on speech is best read as referring to the state’s motive in adopting such rules. The generality argument can be read the same way—the point is not that property has fewer speech effects than copyright, but that those effects are by-products of more general governmental aims.

The First Amendment does worry about government motive, but, as we have seen, that concern has to do with governmental approval or disapproval of content, not with the comparison of one speaker’s content

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44. David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. Pitt. L. Rev. 281, 299 (2004).

45. The Supreme Court dallied with such an idea in the contract context in *Cohen v. Cowles Media Co.*, but refused to take that step, even though enforcement of the promise in that case penalized publication of core speech. 501 U.S. 663 (1991).

46. Netanel, *Skein*, *supra* note 17, at 39.

47. None of this implies that laws pertaining to realty or chattel should be models for copyright. The use of creative works is non-rivalrous, which illustrates a big difference between works and tangible property. My point here is only that these laws have profound effects on speech—much greater effects than Professor Netanel lets on. If the critique is really selling an effects-based view of state action, it has committed to judicial free-speech review of quite a lot of law.

with another's.<sup>48</sup> More fundamentally, the government's actual motive in adopting copyright is to promote expression.<sup>49</sup> The means it has adopted entail suppression of certain types of expression, it is true, but that point goes to the effects of the law, not to the government's aim.<sup>50</sup> As we have seen, the effects-based argument for state action is unsound. For these reasons, Professor Netanel's curiously passive conclusion that "where property rights are not in land, but in information, expression, or communicative capacity, they are more properly characterized as speech regulations"<sup>51</sup> is unpersuasive. Neither formalism nor effects-based analysis justifies it.

Against this analysis one might argue that it is obvious that both the Copyright Act<sup>52</sup> and judicial enforcement of it are state action, and that no one thinks otherwise. It is simply wrong and a mistake to raise this issue at all. Supreme Court doctrine supports this view.<sup>53</sup>

In my view, however, putting the matter this way proves part of my point. Advocates of the free-speech critique think and assert that copyright is state action in just the same way—"it's obvious"—that *Lochner*-era judges were accused of treating property and contract as private action. The doctrine is accepted uncritically, and the sort of normative state action arguments I offer here are not discussed. Yet *New York Times Co. v. Sullivan*,<sup>54</sup> the source of this rule, disposed of the state action issue crudely, by noting that libel is a law, and libel actions invoke the power of the law. That view is far too broad, because it erases any difference between actions initiated by private citizens and actions initiated by government officials. It equates libel actions with censorship, and that is simply sloppy analysis. A court might well reach the same conclusions with respect to each type of case, but the interests at stake and the risks of regulation are different, so the reasoning needs to be different.<sup>55</sup> Treating copyright suits as state action

48. The key doctrinal inquiry is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), *opinion following remand*, 520 U.S. 180 (1997).

49. *Cf. Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (referring to copyright as the "engine of free expression").

50. It might be that advocates of the free-speech critique have ideas that could improve copyright's ratio of speech creation to speech suppression, but that is a different argument from either effects or motives.

51. Netanel, *Skein*, *supra* note 17, at 39.

52. 17 U.S.C. §§ 101-1332 (2000).

53. *E.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (finding that a promissory estoppel claim amounted to state action because "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment").

54. 376 U.S. 254, 265 (1964).

55. The *Times* Court's casual analysis was suited to that case, which was one of a number of cases brought by government officials in an obviously pretextual effort to thwart coverage of the civil rights movement, which those officials opposed. *See McGowan, supra* note 44, at 302-03. But while censorial suits by government officials ashamed of their actions do present the quintessential free-speech worry—censorship by government actors—

makes this problem even harder because, as we have seen, both parties in these cases advance free-speech values and therefore can claim to advance First Amendment interests.

This point may be a small one, because advocates of the critique do address what I call state action arguments when they discuss the distinction between general and specific laws. The point in each case is to ask whether a specific law or lawsuit should be treated as especially threatening to free-speech values, such that society would be better off if judges used the First Amendment to limit the power of representative bodies in drafting the law and the power of private parties in enforcing it.

And here is where the small point is important. It is false to say that copyright “targets” protected speech. The rights do not distinguish between protected and unprotected expression. Specific suits target speech, but in general these are not brought by government officials. They are brought by rights holders, as a trespass action would be brought by a landowner.<sup>56</sup> For all the similarities in analysis, employing the language of general and specific regulations obscures a fact that a straightforward state-action analysis would stress: To the extent that there is “targeting,” or potentially worrisome motives, they involve private rights holders, who probably are after revenue or their own artistic vision, and not government officials trying to feather their nests, hide their misdeeds, or perpetuate their power.<sup>57</sup>

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such suits are not the modal libel action, and certainly not the modal copyright action. The *Times* treatment of state action is a perfect example of a rule offhandedly created to meet a genuine need and then extended to very different circumstances in which that need does not exist. One could of course still favor the *Times* rule—that a public figure alleging libel must demonstrate that the defendant published with actual malice—on the ground that speech is more important than reputation, but that is a different argument from the censorship risk genuinely presented in that case.

56. The Supreme Court’s opinion in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), highlights the significance of the difference between state support of actions initiated by private parties and state action. The regulation in question required solicitors to obtain a permit from the city and allowed homeowners to register with the city and post notices on their homes, denying solicitors permission to enter their property. The Court struck down the permitting portion of the regulation; plaintiffs did not even challenge the homeowner-initiated portion. *Id.* at 156. The Court referred to this section as providing an alternative that could advance the city’s interests in guarding the privacy of its residents and in protecting them from scam artists in a less restrictive way than granting government permission. That homeowners could squelch a form of solicitation to which the Court paid lengthy homage illustrates again the speech-suppressing power of property law. The difference in the case is between suppression initiated by a private citizen and permission mandated by a government official. In terms applicable to *Times*, it is the difference between a libel action filed by a private person and one filed by a government official.

57. This fact does not mean that current copyright law, or any conceivable legal regime, could be “neutral” in the sense of not affecting what gets said or heard, and in each case by whom. That is impossible. But the impossibility of such neutrality does not imply that all regimes are equally good. It is no license to set judges to the task of doing their best for the type of speaker one favors. If nothing else, adopting such a view undercuts most objections to the distortions of the status quo. The question is what approach best approximates the

It is good to remember that the point of this discussion is to determine whether society would be better off treating a law, and assertions of it, as public or private. Insofar as applications of the law are concerned,<sup>58</sup> in the cases of greatest interest to the critique, there will be two speech claims: one by an original author or his assignee, and one by a subsequent author who would like to copy from and do something with the prior work. Treating copyright as state action helps copiers (who may also be highly original transformers of works, but whose only liability risk is for copying) as against those whose work they copy; it helps defendants by making life harder for plaintiffs. This result would only benefit society as a whole if the speech interests of defendants were systematically greater than the interests of plaintiffs. The state action portion of the free-speech critique offers no reason to accept this claim.

### B. *State Action and Free-Speech Theory*

The free-speech critique does not present a strong case for treating assertions of copyright as state action. Even the case for treating the statute itself as a "regulation of speech" is very wobbly. But even if you are inclined to accept the critique, it then faces a conundrum of its own creation. It deconstructs the notion of private action in order to avail itself of free-speech doctrine, which must treat speech as private action.

Democratic theories of free speech illustrate this relationship most clearly. The political justification for free speech is that it allows people to form and voice opinions to which government then responds.<sup>59</sup> If everything is state action, however, including the acts of people who speak, then the notion of state responsiveness is incoherent. The state would respond to itself. It could do that, but it does not have to, and nothing important would be lost if it did not. State regulation of speech would do no more than fine-tune the outputs of the state policies that created the speech.<sup>60</sup>

Nonpolitical theories of free speech also have to treat expression as if it is private action. Claims that speech enhances autonomy, or self-something (realization, actualization, and discovery are the usual candidates) fall apart if speech is the act of the state and not the person (a point I revisit below).

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unattainable goal of neutrality, and in particular what approach minimizes the risk of government officials, including judges, playing favorites with speakers.

58. Applications of the law are different from facial challenges, where the question is really only whether judges can write better laws than Congress. It is this aspect of the claim that makes advocates of the critique defenders of *Lochner*-like judging; the only difference is the ideology they prefer. See *infra* text accompanying notes 124-26. At a practical level, there is no particular reason to believe that judges can write better copyright laws than Congress, especially when institutional considerations suggest that they cannot, and they say that themselves. McGowan, *supra* note 44, at 332-38.

59. For a general discussion of this point, see Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. Colo. L. Rev. 1109, 1124-25 (1993).

60. *Id.* at 1128.



Even claims that speech promotes truth make little sense if speech expresses only policy.

These considerations tend to turn the state action element of the free-speech critique on its head. The critique tries to limit its scope, and thus avoid the burden of rewriting all laws, by emphasizing the tightness of the fit between copyright and speech. But because the First Amendment cannot operate without a conception of private action, the tightness of this fit makes it harder to treat copyright and assertions of it as state rather than private action.

### III. DECONSTRUCTING INDIVIDUAL AUTONOMY

Some leading realists rejected the notion that people are autonomous individuals, at least insofar as that notion might be used to justify classical notions of property and contract. On the demand side, realists tended to view consumers as weak and vulnerable to the oppressive economic power of producers. For example, Morris Cohen claimed that "those who have the power to standardize and advertise certain products . . . determine what we may buy and use."<sup>61</sup> It was the "modern owner of capital" who had the power "to make us feel the necessity of buying more and more of his material goods."<sup>62</sup>

On the supply side, neither workers nor producers were autonomous in any meaningful sense. Cohen dispensed with the Lockean argument for property by asserting that "social interdependence is so intimate that no man can justly say: 'This wealth is entirely and absolutely mine as the result of my own unaided effort.'"<sup>63</sup> Robert Hale's view of law as coercion, and of all exchanges as being coerced by law,<sup>64</sup> was to the same effect.

#### A. *Autonomy in Copyright Arguments*

To set the stage for the free-speech critique's treatment of autonomy, I want to look for a moment at how autonomy is treated in other modern copyright arguments. On the supply side, an important strand of modern copyright criticism seeks to discredit the notion that people create works from their own artistic genius. Professor Jessica Litman argues that "copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them."<sup>65</sup> As she sees it, the truth is that all authors seek to express views that are shaped by "experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction

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61. Cohen, *supra* note 28, at 13.

62. *Id.* at 14.

63. *Id.* at 17.

64. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603, 605 (1943).

65. Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 965 (1990).

between the two.”<sup>66</sup> The upshot is that “[o]riginality is a conceit, but we like it.”<sup>67</sup>

On the demand side, the main arguments against the notion of autonomy are reliance and oppression. With regard to the former, Professors Wendy Gordon and Jeremy Waldron each attack Lockean justifications for copyright by asserting that consumers come to rely on works. In a way similar to the arguments of Morris Cohen, this argument casts consumers as being in a dependent relationship with producers, and therefore vulnerable to harm if producers exercise their rights to exclude.<sup>68</sup> For example, Professor Gordon writes that “[s]ome poems, some ideas, some works of art, become ‘part of me’ in such a way that if I cannot use them, I feel I am cut off from part of myself.”<sup>69</sup>

### B. *Autonomy in the Free-Speech Critique*

With regard to oppression, Professors Yochai Benkler and Neil Weinstock Netanel both suggest that big media conglomerates wield copyright to keep consumers and transformative users under their thumb. Professor Benkler rightly believes there are no strictly autonomous people,<sup>70</sup> but he quite sensibly argues that different laws affect autonomy differently. Laws, such as copyright, that give one person the power to control information another receives conflict with the second person’s autonomy.<sup>71</sup> Professor Benkler does not think the person doing the restricting has any autonomy interest in the restriction.<sup>72</sup>

Professor Netanel follows a slightly different route to much the same place. He is concerned with an idea he calls democratic civil society.<sup>73</sup> That society thrives when people are engaged and autonomous, and it suffers when people are subordinates in authoritarian relations, which are

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66. *Id.* at 1010.

67. *Id.* at 1019. It is a bit much to call originality a romanticized conceit. One could say the same of many odes to the public domain. It would be better to say that the law treats authors generally as if they do individually original work, even if originality is rare, hard to spot, varies among authors, and on some definitions might not exist at all. The structure of the Copyright Act does not entail what Professor Litman derides as conceit; it simply employs a particular form of “as if” treatment. That treatment might or might not be justifiable or adequately justified, and Professor Litman is dead right to focus attention on that question. But calling it a romanticized conceit detracts more from the needed analysis than it adds.

68. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1582-91 (1993); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 Chi.-Kent L. Rev. 841, 867 (1993).

69. Gordon, *supra* note 68, at 1569 (emphasis omitted).

70. Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. Rev. 23, 34 (2001).

71. *Id.* at 49.

72. *Id.*

73. That is, “the sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms.” Netanel, *Civil Society*, *supra* note 17, at 342.

those in which one person has power over another.<sup>74</sup> Professor Netanel applies this somewhat diffuse concept to copyright law in a sophisticated and nuanced way. Copyright can help people raise capital and create power to counter that of the government, which is good, but it can also help people keep other people down, which is bad.

In both arguments, autonomy is a one-way street. Townshend's refusal impinges on Moore's autonomy, but Tarantino's film does nothing to Rafferty. Should the law allow Moore to use *Won't Get Fooled Again* against Townshend's will, to try to make it stand for something Townshend opposes, Townshend's autonomy would be untouched.

Each argument treats this point as obvious, but I think it is not. Logic does not compel this conclusion, and it is unsatisfying to solve the problem with stipulations that simply define "autonomy" or "civil society" to exclude authors once they have published.<sup>75</sup> Nor, for that matter, is "autonomy" an obviously apt phrase to describe what is at stake when someone wants to reproduce or modify work that someone else has done.<sup>76</sup>

At first glance, it might seem that realism could support this claim. For example, Robert Hale saw property rights as threatened coercion by the government to protect the quiet enjoyment of owners.<sup>77</sup> That view implies that private parties coerce each other by exercising state-granted rights.<sup>78</sup> But Hale, who was quite candid in saying that the employee coerces the employer by threatening to withhold labor, just as the employer coerces the employee by threatening to withhold wages,<sup>79</sup> would be the first to admit that one could run the autonomy argument in either direction.

One could say it is authoritarianism for the law to back up Townshend's decision to say "no" to Moore, but one could just as well say it is authoritarianism for the law to back up Tarantino's decision to impress his ebulliently sadistic vision on Gerry Rafferty's song.<sup>80</sup> In what sense is Rafferty less under Tarantino's thumb than Moore is under Townshend's?<sup>81</sup> These arguments might provide reasons for treating both sides of such

74. *Id.* at 342-43.

75. *Cf.* Benkler, *supra* note 70, at 67 (denying that authors have autonomy interests in their works).

76. *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003) (stating that free-speech values have less force when a party copies rather than creates expression).

77. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 471-72 (1923).

78. Hale, *supra* note 64, at 606.

79. Hale, *supra* note 77, at 474.

80. This assumes once again that the law did not require Tarantino to get permission from Rafferty.

81. As we have seen, the formalist view—that Moore is physically doing things we recognize as "speech" and Townshend is not—will not hold up. Whatever one thinks the First Amendment aims to protect, it is not the act of running a mixing machine. The formalist view therefore either fails to explain why speech should be treated differently from car repair, or fails to offer a reason to favor one speaker over another.

disputes as either autonomous or oppressed; they do not provide reasons for distinguishing between the two.<sup>82</sup>

Autonomy receives more complex treatment than state action in the free-speech critique, but to the extent the concept supports the critique, it does so by arguing that the law give rights holders too much power over transformative users, who therefore should be treated as oppressed rather than as autonomous persons. Their work may not reflect their true vision, but only that portion of their vision that has escaped copyright's clutches. They may mean *Won't Get Fooled Again* but be forced to say *Keep on Rockin' in the Free World*. The critique treats rights holders as if this were true.

### C. Autonomy in Free-Speech Theory

At the end of Part II, I argued that the free-speech critique of copyright is in a dilemma because it has to deconstruct the distinction between public and private action while free-speech law must treat speech as private. I now want to argue essentially the same point about autonomy. Any coherent theory of free speech must treat people as if they are autonomous beings, even if they in fact labor under all sorts of constraints. Indeed, free-speech theory must treat them that way even if the notion of autonomy is a complete fiction.

The reason for this is similar to the state action argument. If people are not really autonomous, but instead are conduits for social forces that weigh upon them, or complex functions whose outputs are dictated by socially constructed inputs, then there is no particular reason to take their speech as expressing interests that are meaningfully theirs. There is no reason why they should have a stake in participating in "self government," because there is no self at stake—no "individual" contribution to be made, and no individual identity to be developed.<sup>83</sup> By parity of reasoning, there would be no individual cost to restricting speech.

To look at the point another way, if the individual is socially constructed rather than autonomous, then a restriction on speech is just one way of constructing individuals. It would be hard to deny that severe restrictions on depictions of nudity, bad language, violence, and so on would produce a different social atmosphere—and thus by the logic of this argument a different type of person—than the atmosphere we have now. If we throw autonomy out the window, that atmosphere cannot be defended on the

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82. Certainly one could say that Rafferty is free to defend his vision by any means other than denying permission to Tarantino; Rafferty could rerecord the song, for example, or start a blog explaining how Tarantino had distorted his intended meaning. But this is not an argument. One can say anything. One could say that Rafferty has to take the bitter of Tarantino's treatment of his song in return for the sweet of being able to write in the first place. Or one could say Moore has to take the bitter of Townshend's refusal in return for the sweet of his own rights. Neither statement has any analytical content; without more, each is just a way of expressing a preference.

83. See Post, *supra* note 59, at 1128-31.

ground that it reflects the aggregate interests of people who produce and consume speech. Their interests are not their own, but what society has thrust upon them. On this view, protecting speech would be one way for society to construct its members, but it would have no special status. In restricting speech, the majority does no harm to individuals; it just constructs them differently.

Free-speech doctrine is, of course, just the opposite. Whatever people may in fact be, it treats them as if they are autonomous individuals. If anything, the free-speech romanticizing of individual autonomy goes far beyond what Professor Jessica Litman derides as copyright law's romanticizing of authors. What the Supreme Court recently described as "the heart of the First Amendment"—"the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence"<sup>84</sup>—makes no sense at all if the notion of a person deciding for herself is risible.

This fact makes free-speech doctrine relatively unfriendly turf for launching an assault on copyright. Justice Ruth Bader Ginsburg put the matter bluntly in *Eldred v. Ashcroft*: "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."<sup>85</sup> As with the notion of a person deciding for herself what ideas to believe, if there is no such thing as one's own speech, and if everything one says is the speech of others, then this comment makes no sense.

Not surprisingly, some advocates take just that view. When the free-speech critique's realist deconstruction of autonomy runs into free-speech theory's necessary embrace of autonomy, the natural response is to try to water down the conception of autonomy that free-speech theory employs. The weaker that conception is, the better the free-speech critique works. Thus, Professor Rebecca Tushnet levels complaints at free-speech doctrine that parallel Professor Litman's critique of authorship. She decries the "reigning model of free speech" with its "particular kind of individualism" that leads courts wrongly to focus on "the individual on his soapbox" and assume "that the individual's speech is entirely self-generated rather than assembled from pre-existing cultural resources."<sup>86</sup>

Professor Tushnet is right to say that individualism is the dominant methodological assumption of free-speech doctrine. She is also right to say that free-speech doctrine does not have to presume that all speech is original to the speaker. It could be a question of degree. There is a price to pay for watering down the Court's free-speech individualism, however. To the extent we treat expression as the recycling of existing works with no

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84. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

85. *Id.* at 221.

86. Tushnet, *supra* note 16, at 567.

element of the individual on his soapbox, then, to that extent, there is no cost to individual freedom by restricting one's speech.

Put differently, Professor Tushnet wants people to be freer to contribute to "common culture"<sup>87</sup> than she thinks they are under current free-speech doctrine (including here what she sees as its effects on current fair use doctrine). But if there really is no such thing as an individual perspective, then why is greater participation in common culture valuable? What is lost in limiting such participation? Why should we care if a regurgitation function "participates" in anything; indeed, what could that mean?

I think the answer to these questions is that no one really believes that individual speakers are no more than social conduits. Creativity and imagination may be unevenly distributed, they may exist along various continuums in various expressive endeavors, and the ratio of copied to original expression may be very high in some works. Originality may consist in little more than reproducing a work in a context that alters the way viewers see it.<sup>88</sup> All this may be true, but these ideas still have substance. They are not romantic myths we like to tell ourselves to make ourselves happy.

Even if all that is wrong, however, judges who give meaning to the First Amendment have to choose whether to decide cases as if it were right. Free-speech doctrine that rests on an assumption of individual autonomy will tend to curb restrictions of speech more than a doctrine that rests on the assumption that individuals are something else. To the extent the law treats people as so dependent on culture that they cannot speak without copying, the law has less reason to respect what people say as reflecting a preference that is their own. Either way, these points lead to the same conclusion: With regard to autonomy, the free-speech critique is at odds with free-speech theory.

Against all this, one might argue that stripping away the fiction of the autonomous individual would not lead to illiberal speech law. All it would do, the argument would go, is refocus doctrine away from the individual and toward what Professor Robert C. Post has called "collectivist" notions

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87. I regard this abstraction with great skepticism. I doubt that most things one would consider elements of culture are common in the sense that majorities of people consume them. Culture is more localized than that, on both geographic and demographic lines. To take only one example, the tremendously successful television show *Seinfeld* was never among the top fifty shows watched by black viewers. Roland G. Freyer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. Econ. 767, 768 (2004). Academics (including me) are terrible cultural snobs, and snobbishness consists precisely in not consuming a large fraction of cultural elements. Don't believe me? Quick, name one song by Ernest Tubb. I bet you can't. Though I would also bet you can guess his style of music. If "common" in this argument means only some large group of people, falling far short of even a majority, which I suspect it does, then it substitutes for analysis rather than expressing it.

88. Professor Tushnet thinks courts are insensitive to the role of context in meaning; I think courts do a better job than she allows. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

of free speech,<sup>89</sup> such as the robustness of democratic civil society in Professor Netanel's argument,<sup>90</sup> or the development of common culture in Professor Tushnet's argument.<sup>91</sup> Instead of "defend the speech rights of the individual as against the state," the free-speech bumper sticker would read: "Manage laws affecting public discourse to produce vibrant common culture in a democratic civil society."

These notions are very abstract and, therefore, hard to pin down or measure. To the extent they can be made concrete, they refer either to the net effects of the actions and interactions of real people or to the personal preferences of whoever wields the phrases, be it a scholar or a judge. There is no other option. The personal preferences of scholars and judges provide no legitimate basis for any law. That leaves the net effects of the interactions of people subject to some rule.

At this point, the collectivist argument collapses back into some conception of autonomy, if only insofar as autonomy is a useful assumption to generate information (revealed preferences) about what the collective good really is. Like its predecessor, the free-speech argument for restrictions on racist speech (which was plausibly accused of silencing its targets),<sup>92</sup> when the free-speech critique of copyright descends from the heights of abstraction, it asserts the claim of one speaker over another. It is, if you will pardon the phrase, the same old song: Moore has rights; Townshend oppresses. Collectivist theory rises or falls with the plausibility of that claim.

#### IV. FORMALISM, POPULISM, AND SPEECH

The argument so far shows that the free-speech critique of copyright has an odd feature. It is designed to bring the First Amendment into the copyright fight; however, once free-speech theory arrives, it rejects the premises used to bring it in. What good is that?

I believe the answer lies in the unfortunate detachment of free-speech doctrine from the values and interests it is supposed to express. This detachment is responsible for the widely accepted conclusion that free-speech doctrine is a mess.<sup>93</sup> The fault can be traced to *Police Department of Chicago v. Mosley*,<sup>94</sup> which imported equal protection modes of analysis to free-speech doctrine.<sup>95</sup> First Amendment doctrine consists of categories

89. Post, *supra* note 59, at 1109.

90. See *supra* note 17 and accompanying text.

91. See *supra* note 16 and accompanying text.

92. E.g., Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 436 (1990).

93. E.g., Robert C. Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1270-79 (1995) (arguing that the Court's First Amendment language does not accurately express the values its decisions embody).

94. 408 U.S. 92 (1972).

95. *Id.* at 96. For more on this incorporation, see McGowan, *supra* note 44, at 293-94.

and tiers of scrutiny that focus on laws and their motivations, rather than on the sociology of speech acts and their attendant costs and benefits.

The result is a free-speech doctrine that does not adequately express the theories and values judges enforce in free-speech cases. It is precisely this aspect of free-speech doctrine that invites what Professor Leiter sees as the core critique of realism: When doctrine cannot explain results, analysis should focus on the elements that make up the "situations" to which judges respond.<sup>96</sup>

At least in its current form, however, the free-speech critique trades on precisely this aspect of the doctrine. The critique takes the Court's categorical language out of the context of the cases in which that language is used and applies it to disputes between authors. Professor Netanel provides a particularly clear example of this aspect of the critique:

Since the 1970's, category-specific analysis has come to play a central role in First Amendment and other constitutional jurisprudence. In considering First Amendment challenges to state regulation, courts generally place the speech and regulation in question into a pre-established category and then employ a test of constitutionality that is specific to the pertinent category. This category approach has been subject to cogent criticism . . . . [S]ome commentators have charged that, as developed and applied by the Supreme Court, the category approach has become both doctrinally incoherent and insufficiently attentive to the values underlying the First Amendment. Yet despite this approach's shortcomings, there is no indication that courts will abandon it in the foreseeable future. Largely for that reason, I will take the category approach, at least in its broad outline and rationale, as a given.<sup>97</sup>

Professor Netanel's candor is exemplary, his grasp of the problem is keen, but his resolution of the issue is disturbing. These are not the words of Morris Cohen. The notion that doctrine should be taken for granted because it is doctrine is anathema to realism—indeed, to consequentialism generally. One could just as well say that the reproduction right and term extension have been subject to cogent criticism, and that the notion of a derivative work is incoherent, but that because they are what we have to work with, we might as well live with them.

I do not want to criticize Professor Netanel for not doing things he did not set out to do. The article containing the passage just quoted is basically a brief designed to show judges how to do what Professor Netanel thinks they should do—which is to use free-speech rhetoric to tailor the drafting and application of copyright law to favor the interests of downstream users more than the law currently does. It would also be unfair to label Professor Netanel as no more than a brief writer, however. His work as a whole develops a normative (and largely realist) vision of free expression and the institutions (such as mass media) and laws that contribute to it. His notion

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96. See Leiter, *supra* note 25, at 282-84.

97. Netanel, *Skein*, *supra* note 17, at 31-32.



of “democratic civil society” might be implemented in many ways, from granting small speakers access to resources such as cable channels to limiting the concentration of media firms to writing statutes differently. My point is that when this idea is made concrete in free-speech terms, the normative and realist discussion stops, and formalism takes over.

Professor Netanel is not alone in combining (in his case across works) a normative critique with free-speech doctrinalism. Indeed, he stands out more for his candor in acknowledging the flaws in the doctrines he relies on (which is why I call the quotation “exemplary”) than in his reliance. Nevertheless, taken as a whole, it is odd to see a generally realist critique embrace free-speech formalism. This odd combination makes explicit a point that emerges from the earlier discussion as well: There is a realist ratchet at work in the free-speech critique of copyright. Realism is good for some things, such as deconstructing state action and autonomy, but not for others, such as cutting through the Court’s baroque doctrinal structures to the facts of the cases and the conflicting values they reveal. The critique can start with realism, so long as it ends with the linguistic wreckage of *Mosley*.

Why does the ratchet turn the way it turns? What is it about the formalism of free-speech doctrine that helps the free-speech critique of copyright? I believe free-speech formalism helps the critique because the Court’s doctrines presume a conflict between speech and some other value. The doctrines are not meant to decide cases in which one speaker challenges another. To take them as they are given is to elide this fact.<sup>98</sup>

I believe this fact is fatal to the free-speech critique. At the risk of being a bore, I repeat: One cannot invoke current doctrine on behalf of Michael Moore without either asserting that Pete Townshend has no speech rights, or pointing to a metric showing why his rights are weaker than Moore’s. Current doctrine provides no basis for either conclusion. It cannot resolve this dispute, especially when it is taken for granted.

For the most part, however, advocates of the free-speech critique have not provided reasons for favoring one speaker over another. They have argued as if only one speech interest was at stake, but they have not explained why. This omission is perplexing. Advocates of the critique do seem to agree that the meaning of a work may change over time and that people may attempt to manage those changes, so that meaning is a dynamic concept.

For example, in the very first paragraph of his extremely learned contribution to the critique, Professor Netanel describes a recent dispute, *SunTrust Bank v. Houghton Mifflin Co.*, in which the trustees of Margaret Mitchell’s estate sued Alice Randall, who sought to trash Mitchell’s *Gone with the Wind* by copying substantial portions of it for her book *The Wind*

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98. It also worsens the bad aspects of the doctrines. They are already disconnected from the situations to which they are applied; to apply them to conflicts between speakers is to increase the distance between them and the situations to which they are applied.

*Done Gone*.<sup>99</sup> He refers to Ms. Randall's claim that she "wrote her parodic sequel, a work laced with miscegenation and slaves' calculated manipulation of their masters, in order to 'explode' the racist stereotypes and romantic portrait of antebellum plantation life perpetuated by Mitchell's mythic tale."<sup>100</sup>

"Perpetuated" is an apt word. The trustees of Margaret Mitchell's estate did not want her work trashed; they sued to defend the meaning of the book as they saw it and as they wanted others to see it. The fight between the parties was not a fight between speech and state, but a fight between speakers over who would get to try to influence public perceptions of *Gone with the Wind* and how they would get to try. Once one grants this point, which Randall herself stressed, there is no way to deny that the case represents a conflict between speech interests.

Nevertheless, I am not aware of any of the many discussions of the case that treat the Mitchell estate as having any free-speech stake of its own. When Professor Netanel returns to the point, he says that courts should use the First Amendment to influence fair use analysis, and that "[c]opyright holder control should not extend to preventing reformulations that serve as highly effective critical commentary on the original."<sup>101</sup> No longer do the trustees perpetuate meaning; they just suppress it. The first formulation was right, the second is not, and the first undercuts the arguments advanced for the second.

I think free-speech formalism contributes to this tendency to recognize as a factual matter that authors may be able to manage the meaning of a work, but to ignore this fact when it comes to the law. After all, the doctrines make no mention of the fact, so one need not confront it in reciting phrases like "intermediate scrutiny." There are two levels of irony in this. One, which I mentioned before, is that such blinkered reliance on doctrine is exactly what realists inveighed against. The other is that *Mosley*-like categories and tiers of scrutiny are designed to flush out unequal treatment and the bad motives such treatment implies, not to balance interests in conflicts between members of the same class. As applied to disputes between speakers, they systematically treat members of the same class differently.

Against this, one might argue that even if the Mitchell estate and Ms. Randall both have speech interests, they are not similarly situated—Ms. Randall's interests are greater. I have said that the free-speech critique does not supply this argument, as *The Wind Done Gone* example illustrates. There is one argument in the critique that can be read as distinguishing between speakers, however. I do not think it succeeds, but it provides an

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99. *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001); Netanel, *Skein*, *supra* note 17, at 2.

100. Netanel, *Skein*, *supra* note 17, at 2..

101. *Id.* at 83.

interesting perspective on the relationship between the critique and legal realism.

Here is the argument. In *Associated Press v. United States*,<sup>102</sup> Justice Hugo Black wrote that the First Amendment values both “the widest possible dissemination of information” and the dissemination of such information from “diverse and antagonistic sources.”<sup>103</sup> Many advocates of the critique claim that this phrase establishes a free-speech principle.<sup>104</sup> In other work I have explained why I think this phrase cannot bear the weight they want to put upon it.<sup>105</sup> I do not want to rehearse those reasons here. I do want to explore briefly what these words meant in the situation to which they were applied, and what they might mean when taken out of context—as the critique does—and applied to other situations.

Justice Black’s language did not address a conflict between speakers of the kind we see in the example of Townshend and Moore, and in the *SunTrust* case. There was no fight over the meaning of a popular work. The conflict was between newspapers—those that wanted to join the Associated Press and member papers that wanted to restrict membership.

Much of the content at issue in the case was homogenous—republication of stories from member papers—so “diverse and antagonistic” cannot be read as referring to the content at issue. Those terms are best read as referring to the papers themselves; they are a way of expressing in free-speech terms Justice Black’s robust populism.<sup>106</sup> The point of the passage, to the extent it has any point other than as free-speech frosting on an antitrust cake, was to emphasize Justice Black’s belief that the law should protect small businesses over big ones.<sup>107</sup>

What might this language mean apart from the antitrust context to which it pertains? The notion of wide dissemination of information has little relevance here, unless one interprets it to mean that free-speech doctrine protects all those who wish to distribute a work. That meaning is consistent

102. 326 U.S. 1 (1945).

103. *Id.* at 20.

104. *E.g.* Neil Weinstock Netanel, Copyright and ‘Market Power’ in the Marketplace of Ideas 158-59 (2004), available at <http://ssrn.com/abstract=721281> [hereinafter Market Power]; Netanel, *Skein*, *supra* note 17, at 64, n.272; Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1, 57 (2000).

105. McGowan, *supra* note 44, at 309-13.

106. On Justice Black’s populism, see Roger K. Newman, Hugo Black 6-13 (1994); see also *Justice Black Dies at 85; Served on the Court for 34 Years*, N.Y. Times, Sept. 25, 1971, at A1. At the height of the mid-1960s small-dealer merger rulings, *Fortune* magazine reportedly dubbed Black’s relentless opposition to mergers “Antitrust in a Coonskin Cap.” Arthur Austin, Book Review, 56 U. Cinn. L. Rev. 193, 202-03 (1987) (reviewing Ernest Gellhorn, *Antitrust Law and Economics* (1986)).

107. His opinion did the opposite, McGowan, *supra* note 44, at 311-12, but that was a predictable result of his approach to antitrust law. See, e.g., *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); see also Richard A. Posner, *Antitrust Law* 129 (2d ed. 2001) (explaining harm to small firms of approaches reflected in the *Von’s* case).

with the facts of the case, but as applied to copyright it implies that the reproduction right itself is unconstitutional. Cogent as it is, few people want to make that claim.<sup>108</sup>

The notion of "diverse" sources is ambiguous. It could mean the largest number of people, which is in fact the most natural reading if we cast an eye back to Justice Black's concern to keep alive as many small papers as he could. "Diverse" could also be read to refer to the greatest variety of different types of people, though what counts as a type remains an open question. Either reading puts the reproduction right at risk again.

It would be possible to avoid this implication by straddling the fence between sources and content. One could simply say that doing away with the reproduction right would be bad for speech, but so would penalizing authors like Alice Randall—so one's speech rights correlate with the degree to which one transforms a work, in addition to copying it.<sup>109</sup> The First Amendment should be read not to promote either the diversity of expression as such or the sheer number of speakers, but to try to establish the socially optimal equilibrium between participation and originality.<sup>110</sup>

This straddle is an appealing idea, but a diffuse one. Its appeal lies largely in its diffuseness. Because on the critique's own account both participation and diversity of expression are speech interests, a judge would have to invoke some principle of weighting that the critique does not specify. How much variance should be sacrificed for what level of participation? The equilibrium idea does not itself help judges answer this question, and therefore offers neither guidance nor constraint in determining when the equilibrium has been reached. Certainly nothing in the doctrines we are to take as given provide guidance on this question. It is hard to see how the equilibrium idea could help a judge analyze a case, rather than give her rhetorical cover to do whatever she wants.

One might try to solve this problem by invoking the distinction between parody and satire, so that works that attack an existing work, such as *The Wind Done Gone*, have greater rights than works that do not, such as Tarantino's film and Moore's. One could argue that it is hard to attack a work without copying a lot of it, so there are fewer good substitutes that

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108. See Tushnet, *supra* note 16, at 547 (stressing that she does not make such a claim). But cf. Baker, *supra* note 31 (making that claim).

109. Market Power, *supra* note 104, at 159.

110. Professor Netanel argues that this is a point I missed previously. *Id.* at 159 n.53. I do not think so. My point both then and now is that neither free-speech theory nor doctrine provides a premise for limiting copyright power in such cases. That both diversity and participation are speech values does not refute this claim. Indeed, that argument presumes that only Moore or Randall participate, while ignoring the choices made by Townshend and the trustees of the Mitchell estate, even though those choices rationally relate to a free-speech value—the coherence of a message an author wants to express. Even ignoring such choices, however, to point out that participation and variety may trade off simply raises the question of what decides between the two when they conflict. My claim is that a theory of free speech does not provide a mechanism of decision, unless one wishes to incorporate into that theory a specific ideology, such as some particular strain of populism that then does the real work.

could serve as inputs for such an attack than there are for other types of works. One could relate the scarcity of good substitutes for such attacks to the free-speech question of whether a regulation of speech leaves open "ample alternative channels of communication."<sup>111</sup>

This argument is part of the economic analysis of fair use,<sup>112</sup> so one does not need free-speech to get here. But at first glance, there seems to be no harm in connecting it to the First Amendment. In *Associated Press* terms, the claim is that participation should be weighted more heavily when not much diversity can be achieved anyway.<sup>113</sup>

The problem, however, is that this argument continues to duck the speech issue by presuming that "participation" is a one-way street. The argument presumes that Alice Randall participates, but the Mitchell estate does not. That is just wrong. When the trustees of the Mitchell estate try to manage the modern meaning of *Gone with the Wind*, they participate in whatever one wants to call the aggregate of speech acts—be it democratic civil society or the creation of common culture. That is in fact precisely the objection Ms. Randall raises: The Mitchell trustees are trying to preserve ("perpetuate" in Professor Netanel's terms) a meaning she does not like. If their acts were unrelated to the public's impressions of *Gone with the Wind*, she would have no such objection.<sup>114</sup>

That leaves "antagonistic," which seems more promising. Justice Black used the word to refer to sources, but an antagonistic source is likely to produce antagonistic content, so it is not too much of a stretch to apply it to uses such as Randall's. Dissent is a strong part of the free-speech tradition. It generally refers to dissent against government measures rather than novels, but the concept is malleable enough to stand a little expansion.

Not too much though. For this argument to work, it is important that whatever Townshend and the trustees of the Mitchell estate are doing, it must not count as "dissent." Why doesn't the view of the Mitchell trustees count as dissent against the prevailing orthodoxy of racial equality, or political correctness, however? Why doesn't Randall's trashing impair that dissenting voice? Townshend's voice seems clearly intended to dissent against heavy-handed demagoguery; to allow (what he might see as) a heavy-handed demagogue to appropriate that message will tend to diminish it.

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111. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989).

112. Richard A. Posner, *When Is Parody Fair Use?*, 21 J. Legal Stud. 67, 67-68 (1992) (suggesting a narrow scope for fair use that attacks a work, though not for a use that uses a work to attack something else).

113. *Associated Press v. United States*, 326 U.S. 1 (1945).

114. It is true that the trustees might fail in their efforts to influence understandings, but, as noted earlier, so might Ms. Randall. The risk of failure does not imply that efforts to manage meaning are not participation (if it did neither would be a speaker); the classification of "speaker" has to be fleshed out by analysis of the relationship between choices, actions, and free-speech values.

The free-speech critique seems to insist that only the marginal speaker is a dissenter, but it does not provide reasons grounded in the First Amendment to understand the concept of dissent that way. The reading is counterintuitive. It tends to reflect a static, and, therefore, unrealistic, view of how expression can be managed over time. Because meanings depend on contexts, and because the facts that constitute contexts are constantly changing, both rights holders and those who would copy from them are marginal speakers; they both try to influence the way people understand a work. It is true that one speaker would make more copies than the other, but unless there are reasons why the coherence of a message should be given no free-speech weight, this fact does not make one speaker a dissenter and the other not.<sup>115</sup> It may be true that Townshend would have let Moore have his way for a price, but it remains the case that, if the law allows him to safeguard its meaning and he actually does so, Townshend's work can stand as criticism of Moore's approach to making movies.

It is possible to draw on Justice Black's populism to support a different meaning of dissent. One could stipulate that dissent takes place only when the powerless speak out against the powerful. Big companies oppress; the little guy dissents. To one degree or another, this idea does appear in the free-speech critique. It appears in Professor Lawrence Lessig's condemnations of "big media,"<sup>116</sup> Professor Benkler's opposition to giving speech rights to corporations,<sup>117</sup> and Professor Netanel's suspicion of media concentration, as well as his bringing into the critique Professor Steven Shiffrin's claim that free speech favors expression of the "fears, hopes, and aspirations of the less powerful to those in power,"<sup>118</sup> an expression that is most naturally read to refer to government officials, but which can also be read to refer to private economic power.

Professor Jack Balkin is most explicit on this point. To the quite accurate claim that the free-speech critique is a type of modern "Lochnerism," whose advocates wish to persuade the Court to read into the Constitution a set of policies they prefer, trumping laws produced by more representative branches in response to technological and other economic changes,<sup>119</sup> he objects that in this argument

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115. And, as noted above, the act of copying is not itself valuable in terms of speech. Lots of unprotected speech acts can be copied; fraudulent investment prospectuses are copied all the time. The value inheres in what is being copied, how it is being copied, and how this combination contributes to values we interpret the First Amendment to embody.

116. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 57-58 (2004).

117. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 173, 223.

118. Market Power, *supra* note 104, at 159 (quoting Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America*, at xi (1999)).

119. Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *Yale L.J.* 2331 (2003).

small-scale artists, software programmers, Internet end users, and consumers who seek a robust public domain are the functional equivalent of the Robber Barons and concentrated economic interests of the Gilded Age, while today's media corporations like Microsoft, Disney and Viacom are the functional equivalent of immigrant laborers in sweatshops at the turn of the century.<sup>120</sup>

In other words, what really matters is who wins, not why.<sup>121</sup>

I think this move should be rejected on both the facts and logic of the matter. On the facts, even if one likes the idea of an overtly populist (or progressive in the most partisan sense) First Amendment, that idea fits poorly with the facts of the cases we have examined here. The defendant in *The Wind Done Gone* case was the Houghton Mifflin Company. Michael Moore's film was funded by the Walt Disney Corporation, which elsewhere serves as the Darth Vader of the critique.<sup>122</sup> The most popular expression—the most likely candidates for what Professor Tushnet refers to as common culture—will be produced by the type of firms populist ideology condemns.<sup>123</sup>

At a logical level, even if one accepts that free speech is itself a partisan stance,<sup>124</sup> no theory of free speech can withstand the incorporation of too much overt partisanship, either of the "soak-the-rich" variety or any other. Populist politics and free-speech theory overlap, but by no stretch of the imagination are they the same. Every other brand of politics overlaps with free-speech theory, too. The theory provides no basis for giving favored status to any of them; that is closer to what it decries. First Amendment doctrine does not allocate rights based on wealth or power, a point on which the context-insensitivity of the doctrine hurts the critique rather than helps it. Those with money and power can do more with rights than those without, but unless we treat speech as state action, which no coherent

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120. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 27 n.46 (2004).

121. Professor Balkin is admirably straightforward in professing this view. This is also true of his contribution to the collectivist free-speech debate that preceded this one, regarding restrictions on racist speech. Balkin, *supra* note 21, at 386-87. It is interesting that, in this earlier work, Professor Balkin ties the notion of dissent to the sort of populist egalitarianism I discuss in the text. *Id.* at 387.

122. Mary Corliss, *A First Look at "Fahrenheit 9/11,"* Time Online Edition, May 17, 2004, <http://www.time.com/time/arts/article/0,8599,638819,00.html>. One comment on this paper insisted that I mention that Disney did not want to distribute Moore's film, presumably because it thought the content too controversial. That is true but irrelevant to the point that all speakers in these examples are rich. The movie was distributed by Lion's Gate Films, a company with 2004 revenues of \$384,891,000. See Lion's Gate Entm't, Annual Report '04, at 87 (2004) available at <http://www.lionsgatefilms.com/investors/pdf/LGF2004.pdf>.

123. While it is true that, as digital technology and networks drive down the cost of distributing content, populist ideology may fit the facts of a larger fraction of the relevant cases, the fundamental objections to an overtly ideological First Amendment remain.

124. See generally Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* 116-19 (1994).

speech doctrine can, that fact does not justify reading populist policies into the Constitution.<sup>125</sup>

### CONCLUSION

The upshot of all this is that the free-speech critique trades on the formalistic weakness of free-speech doctrine to avoid dealing with a conflict between speech interests. It takes judicial language out of context,<sup>126</sup> and, when pressed, asserts a populist version of realism that insists that the less powerful in society have greater speech rights than the more powerful, because the less powerful have to be able to copy if they are to speak.

This half-hearted realism discounts the speech interests it does not like and, therefore, does not achieve the goals of realists such as Cohen and Hale. Those scholars employed realist methods to strip away ambiguous language and diffuse concepts, such as property, to get at the human interactions at issue in concrete cases.<sup>127</sup> As Hale's employer and employee coerce each other, so infringement plaintiffs and defendants fight for different meanings. For rock-ribbed conservatism expressed through words like "property" and "contract," the critique exchanges equally rock-ribbed progressivism.

In the process, I think the critique degrades the concept of realism it partly employs. Realism is a way of looking at the law and a call to investigate certain facts. It is a method—a way of doing law—not an ideology. Many realists advocated progressive policies, but to cast the free-speech critique as realist in the sense that it gives the weak in society a boost is to strip away from realism what is of genuine value to the law.

Hale's theory of coercion draws attention to a Hobbesian world in which real suffering occurs; it fails because, if everything is coercion, then the concept of coercion cannot distinguish situations or decide cases.<sup>128</sup> If the free-speech critique embraced realism fully, it would encounter the same fate. When speech interests pervade a case, they cannot decide it. That is a realistic look at the free-speech critique.

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125. It is notable in this regard that in trying to deflect the too-close-to-home charge of "Lochnerism," Professor Balkin tries to spin judicial rejection of the critique (in *Eldred*) as akin to cases in which the government outlawed dissent. Balkin, *supra* note 120, at 27 n.46.

126. This is mitigated by the fact that free-speech doctrine is itself largely indifferent to context.

127. That is what should be at issue. See Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1 (1894).

128. See Richard Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 Mich. L. Rev. 1697 (1999).



## APPENDIX: OBJECTIONS AND RESPONSES

In order to keep the argument in the text focused, I have tried to acknowledge and respond to only those arguments that bear on my discussion of realism and the free-speech critique. Over the past couple of years I have heard a large number of interesting objections to my general approach, some of which may have come to your mind as you read this Essay. I therefore take a moment here to state the most significant of those objections and respond to them.

Apart from one scholar's explanation that "your argument made me want to puke," the objections I hear generally begin with some phrase such as "you just don't get it." So you may wish to imply that phrase before each objection, as follows.

You just don't get that:

*Sometimes copying is necessary for people to speak at all.*

I think this objection is right. It does not follow, however, that an author such as Rafferty, Townshend, or the trustees of the Mitchell estate have no speech interests. My only claim is that the First Amendment does not supply a premise that can resolve conflicts among speakers, so I do not think this assertion refutes it. The assertion just ignores one speech claim in favor of another.

I also think there are relatively few cases in which copying is necessary in the sense that a work could not be done without it. It depends on the point being made. One can quote Justice Louis Brandeis to make a point about individualism, one could quote someone else, or one could just make the point directly.<sup>129</sup> Moore got along fine without Townshend's music.

One can even write biographies without quoting the subject's works,<sup>130</sup> though I would agree that in such cases the quality of a downstream work would suffer more from an inability to copy than would be the case for Michael Moore. Saying that copying is "necessary" would be closer to the truth in such cases. Some examples, such as Professor Tushnet's example of reciting religious texts to affirm one's belief, make out a strong case of necessity, though I would find it odd to base free-speech doctrine on such an unrepresentative speech act (however, the example does offer an interesting window on the critique's notion of autonomy).

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129. This is part of my response to what I see as Professor Tushnet's exaggerated view of the need to copy. Tushnet, *supra* note 16, at 574-78. (The other part is that it is odd to make this argument about a quotation from a judicial opinion when the thesis of your article is that context matters greatly to free speech and copyright law.)

130. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

*If people can't copy, there will be a hole in their intended expression.*<sup>131</sup>

This is a milder version of the previous criticism. It, too, is right, though detached from any concept of necessity, it has no logical stopping point short of the abolition of the reproduction right. No one wants that, but neither does free-speech theory or doctrine provide a logical stopping point for this argument once it gets going. It is an invitation to balance, which makes it important to recognize what is being balanced. Like the previous criticism, this objection presumes there is only one speech interest at stake in a case. The hole in Tarantino's expression might well become a smear distorting Rafferty's if the law reverses position, so this criticism gets little traction.

*Public discourse would be impoverished without copying.*

This is a more diffuse version of the first two objections. It too ignores speech interests such as Townshend's, and it trades on an ambiguous concept. It does not justify the free-speech critique. I personally think the point is right, however. I prefer a world with *The Wind Done Gone* to a world without it. What I cannot do is make free-speech theory produce that result.

*Margaret Mitchell is dead. She has no speech interests.*

There is no arguing with the premise here, and I share the intuition that dead authors have fewer interests (at least dignitary interests) at stake in fights over expression. That might justify discounting the participation interests of the Mitchell estate. But if we follow the critique's deconstruction of the notion of autonomy, it is hard to see why it would. If everyone is in some sense channeling the words of others, then that the trustees of the Mitchell estate do so provides no basis for singling them out. The trustees are fighting for Ms. Mitchell's vision, which is distinct from other visions such as Ms. Randall's, so the diversity interest remains the same.

*Pete Townshend is just greedy. He has no speech interests.*

It would be possible to state this argument through innuendo and abstraction, but that tactic would boil down to this blunter version, which makes it easier to see that it is part ad hominem and part non sequitur.

Nevertheless, I can see the appeal of part of the argument. A rights holder who does not try to control the meaning of a work, but instead agrees to any use so long as the money is right, seems less interested in contributing a distinct message to public debate than do the trustees of the Mitchell estate. I could imagine arguments along this line for

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131. Professor Tushnet makes pretty much this accusation. Tushnet, *supra* note 16, at 574-78.

distinguishing among speakers. Such arguments would have to deal with the fact that revenue maximization promotes expression, however, and they would create incentives that, from the perspective of the critique, are perverse (you are worse off the more uses you agree to).

*Even if Townshend or the trustees of the Mitchell estate have speech interests, you have not shown that their interests outweigh the interests of downstream transformative users like Moore or Randall.*

I think this criticism is right, but that it cuts both ways and is irrelevant to my thesis. On the first point, the free-speech critique has so determinedly asserted that the copyright glass is half-empty that I am aware of no work that both advances some form of the critique and treats rights holders as speakers. For that reason, the critique offers no reason to believe that Moore's interests should be weighted more heavily than Townshend's (even aggregated across all speakers). Put differently, if the free-speech critique asserts that some sort of weighing methodology is vital to an argument about copyright and free speech, then it fails its own test. On the second point, I do not claim that the interests of Townshend outweigh Moore. I am as conventionally socialized as anyone else, so my reflex is to treat Moore's interests as more important than Townshend's. Reflexes are not theories, however, nor are they reasons. I do claim that no theory of speech, as a theory of speech, provides a premise for deciding that issue.

*The law already recognizes a form of "asymmetrical speech theory" because the copyright term is limited. That means that authors get only so long to establish their meaning, after which users get to try to alter it. And as a practical matter most works that will have a recognizable meaning will attain it fairly quickly, and it will be strong enough to retain its coherence in the face of works such as The Wind Done Gone, which means that allowing transformative copying will add to the diversity of speech without reducing its coherence, which is an obvious net gain.*

These points were made in comments from Professor Justin Hughes (the phrase "asymmetrical speech theory" is his).<sup>132</sup> I have no quarrel with policy judgments that give authors a limited time to get their message across. If I had my way, we would have an initial term of about a year, with formalities and the chance of indefinite renewal at roughly twenty-year intervals. That seems like good policy to me. But this judgment is not grounded in a theory of why speech is important enough to get special status among the universe of legislative objects.

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132. They reflect themes in his work. See Justin Hughes, *Fair Use Across Time*, 50 U.C.L.A. L. Rev. 775, 795-96 (2003) (making the point that diversity and coherence need not trade off); Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L. J. 287, 364-65 (1988) (same).

More practically, I do not doubt that most works have no readily recognizable meaning after a relatively short period of time, but those are not the works that create cases such as *SunTrust*. It is the subset of works for which meanings do persist that create such cases, and it is in that subset that the conflict among interests is most keen. I would tend to agree that works in this subset have such stable meanings that works such as *Ms. Randall's* will do little to dislodge them, but that is an empirical intuition based on a subjective evaluation of expression. Courts are not well suited to make such empirical judgments, and subjective evaluation of the status of expression is closer to the evil the First Amendment is aimed to avoid than to the promise it hopes to achieve.

*All this talk of theory is rubbish. There is no free-speech principle, so the fact that it cannot distinguish between "speakers" means nothing. There is nothing wrong with interpreting the First Amendment ideologically because all interpretations of it are ideological. You may not like the ideology of the critique, but so what? All that is at stake is whether this particular law helps the rich get richer, or whether it gives powerless people some power.*

Sad to say, I think a lot of this objection is right. I certainly dislike populism, though I have tried not to let that dislike infect my logic too much. Certainly people who want to restrict speech view the First Amendment as little more than an exercise of raw power by people who like pornography and hate religion. I do not agree that free-speech theories are worthless; they at least put positions to the test of reason. That is our job. It is true that they do not establish objective truth with regard to speech, which means that our jobs are destined to produce frustration. But that is no reason not to insist that diffuse phrases be made concrete and that arguments be followed where their logic leads.

My main response to this objection in this context, however, is that this is not what the free-speech critique says. The critique presents itself as a theory rather than an attack on theory. More fundamentally (if you will pardon the pun), this sort of anti-foundationalism pulls the rug out from under the critique itself. If power is all there is, then there is no basis for complaining about the way it has been exercised. The entire critique would boil down to a dirge for the legislative failures of the copyright left. Maybe that is the most realistic take of all.